No. 82-6172

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JIMMY LEE GRAY,

Petitioner,

vs.

EDDIE LUCAS, WARDEN AND THE ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Should certiorari be granted to consider whether the Eighth and Fourteenth Amendments require the sentencer in a death penalty case to find beyond a reasonable doubt that the aggravating circumstances outweigh any mitigating factors proffered for consideration?

II.

Should certiorari be granted to determine whether the Sixth Amendment requires in capital cases a heightened standard for effective assistance of counsel and, more particularly, a greater duty of counsel to investigate and prepare for trial?

III.

Should certiorari be granted when the petitioner has wholly failed to properly raise and preserve any Eighth and Fourteenth claim concerning the prosecution's interjection at sentencing of petitioner's future dangerousness?

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I. PREFACE

Petitioner, Jimmy Lee Gray, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in the panel decision dated June 10, 1982, and the order denying a petition for panel rehearing and suggestion for rehearing en banc dated September 3, 1982.

II. OPINIONS BELOW

Court of Appeals. The panel decision of the Court of Appeals is reported as Gray v. Lucas, 677 F.2d 1086 (5 Cir. 1982). The per curiam opinion of the Court of Appeals denying panel rehearing and rehearing en banc is reported as Gray v. Lucas, 685 F.2d 139 (5 Cir. 1982).

District Court. The opinion of the United States District Court for the Southern District of Mississippi denying Gray's writ of habeas corpus is unreported. See Gray v. Lucas, Civil Action No. S80-0564 (C) (S.D. Miss. November 26, 1980).

State Court. The opinion of the Supreme Court of Mississippi upholding on direct appeal Gray's capital murder conviction and the sentence of death imposed in its wake is reported as Gray v. State, 375 So.2d 994 (Miss. September 26, 1979) (en banc), cert. denied 446 U.S. 988 (June 2, 1980).

III. JURISDICTION

Petitioner seeks to invoke the appellate jurisdiction of this Court by way of a Petition for Writ of Certiorari drawn and presented under the authority granted in 28 U.S.C. § 1254(1). Respondents do not take issue with petitioner's jurisdictional statement.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately identified and set forth the constitutional and statutory provisions involved in this cause.

V. STATEMENT OF THE CASE

Petitioner, on former days, received bifurcated trials by jury in the Circuit Court of Jackson County, Mississippi. Gray's first trial was adjudicated in two stages as required by Jackson v. State, 337 So.2d 1242 (Miss. October 5, 1976), which held ". . . that Mississippi's ["mandatory"] death penalty statute [was] constitutional as construed and implemented by [the Jackson] opinion and that it satisfie[d] the concerns expressed in Furman [v. Georgia] and the other recent cases." 337 So.2d at p. 1256.

The Mississippi Supreme Court reversed petitioner's first conviction, finding reversible error in both the guilt-finding and sentence-determining phases of the bifurcated trial. Gray v. State, 351 So.2d 1342 (Miss. November 16, 1977).

At the sentencing phase of Gray's second trial conducted under statutory bifurcation in April, 1978, before the same jury fixing guilt, the State relied upon the testimony and exhibits admitted upon the trial of the guilt-finding phase. It also introduced a copy of the judgement and sentence of the Superior Court

of Arizona, certified according to the Act of Congress, in the case of State of Arizona v. Jimmy Lee GRAY, No. 5144, showing that petitioner, pursuant to a plea of guilty, had been previously sentenced to serve not less than twenty (20) years nor more than the term of his natural life, on March 7, 1968, for the crime of second degree murder.

Gray did not testify at the sentencing phase but did introduce a psychological evaluation report dated July 17,1969. This report was prepared under the auspices of the Arizona State Prison, Psychological Department, Florence, Arizona. Petitioner also relied upon prior testimony adduced during the guilt phase of the trial and thereafter rested his case.

In rebuttal, the State produced psychologist, Charlton Stanley, an employee of the Mississippi State Hospital at Whitfield, Mississippi. The substance of Dr. Stanley's testimony is reflected in the state court opinion reported in 375 So.2d 994, 1003 (Miss. 1979).

At the close of the sentence-determining phase the trial court granted Instruction No. C-15. Submitted for the jury's consideration as possible aggravating factors were the following four statutory aggravating circumstances:

> 1. The Murder of Deressa Jean Scales was committed by the Defendant, Jimmy Lee Gray, while the said Defendant was under a sentence of life imprisonment by the Superior Court of the State of Arizona, County of Yuma, imposed on the 7th day of March, 1968, in Cause number 5144 of the said Court.
>
> 2. The Capital Murder was committed while the Defendant was engaged in the commission of the crime of kidnap,
>
> 3. The Capital Murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of the Defendant, and
>
> 4. The commission of the Capital Murder in this case was especially heinous, atrocious, or cruel.

The trial judge also granted Instruction No. C-16. Submitted for the jury's consideration in a mitigating context where the following:

> 1. The offense was committed while the Defendant was under the influence of extreme

mental or emotional disturbance.

2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. Any other matter brought before you which you deem to be mitigating on behalf of the Defendant.

The jury retired from the courtroom to deliberate at 4:10 p.m. and returned a verdict of death at 5:45 p.m. That verdict reads as follows:

> "We, the Jury, find unanimously after weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh or overcome the aggravating circumstances, and that the Defendant should suffer the penalty of death." "We, the Jury, find unanimously beyond a reasonable doubt that the following statutory aggravating circumstances exist in this case, to-wit: Items, 1, 2, 3 and 4 of instruction C-15.
>
> /s/ Charles J. Bridley, Jr.,
> Foreman"

Two attorneys from Pascagoula, Mississippi, (Wright and Heidelberg) were appointed to represent Gray prior to his second trial. During the numerous consultations conducted with their client [E.H. 85-86], trial counsel repeatedly asked Gray if he knew of any witnesses — particularly family members — that he [Gray] would like for them to contact. [E.H. 105, 119-20, 123, 132-33, 136-37] Petitioner was specifically asked about his mother —— a logical starting place —— but Gray did not desire to produce her. [Wright: E.H. 75, 105, 116; Heidelberg: E.H. 119-20] Gray ". . . was very reluctant, as a matter of fact, he didn't want anybody in his family." [E.H. 119] Counsel attempted to contact Gray's brother, a California resident who could not secure sufficient funds to come to Mississippi for the first trial. [E.H. 124-25] They considered producing Gray's girlfriend, but she had left Pascagoula after Gray's arrest and could not be located. [E.H. 89, 120-21, 123, 133] Regardless, Gray did not want either one of them contacted. [E.H. 121, 125] Trial counsel seriously considered calling Detective Biggs who had befriended Gray during his period

of pre-trial incarceration and who "liked Jimmy." [E.H. 104, 119,133]

Heidelberg specifically recalled further efforts. [E.H. 119] He telephoned Ingalls Shipyard in an attempt to locate Gray's former employer and business associates. Petitioner's company, however, had completed its computer programming operations and had returned to Chicago. [E.H. 123] Gray could not provide the names of anyone in Chicago that Heidelberg could talk to. [E.H. 132] Heidelberg also solicited assistance from the Pascagoula Probation and Parole Office, but they could not provide any useful information. [E.H. 133-34] He talked to Fondren about local people, but the only name former counsel could produce was that of Neil Beckham. In Heidelberg's opinion, Beckham —— a mild retardate —— would not have been a good witness. [E.H. 123-24] In short, Gray could not, and did not, provide counsel with any names even though this information was sought on repeated occasions. Heidelberg testified that Gray fully understood the nature of the bifurcated proceedings and ". . . I told him we could bring in almost anything that . . . would help him, but there was nobody that he told us that he really wanted to see or talk to . . ." [E.H. 120] Heidelberg questioned the propriety of using "prison personnel" to impart to the factfinder matters focusing upon Gray's character. [E.H. 136]

The written opinion penned by the Supreme Court of Mississippi in the wake of direct appeal and the opinion of the Court of Appeals precipitated by the denial below of habeas redress contain a fair and accurate recitation of other pertinent facts involved in Gray's quest for plenary review.

On January 16, 1981, the Court of Appeals granted petitioner's application for stay of execution pending final disposition of his appeal to the Fifth Circuit. Respondents did not seek to reset the day of execution following final disposition by the Court of Appeals, and at the present time a new date for petitioner's execution has not been fixed.

VI. REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE STANDARD, IF ANY, BY WHICH AGGRAVATING CIRCUMSTANCES MUST OUTWEIGH ANY MITIGATING CIRCUMSTANCES PROFFERED FOR THE SENTENCER'S CONSIDERATION IS A MATTER OF STATE LAW AND NOT FEDERAL CONSTITUTIONAL LAW.

The first question posed by petitioner is not cert-worthy because the applicable standard, if any at all, by which aggravating circumstances must outweigh mitigating factors at a capital sentencing hearing does not present a substantial federal question implicating the Constitution of the United States. Rather, the question posed involves a matter of state law that should, in all fairness to the individual states, be immune from federal intrusion. Additional reasons for denying plenary consideration of this issue are proffered as follows:

[1] The Opinion Below Was Accurate and Correct. The Court of Appeals for the Fifth Circuit gave full consideration to this matter not only on direct appeal [685 F.2d 1086, 1107] but also in the wake of Gray's petition for rehearing [685 F.2d 139, 140-41]. The opinions penned below are accurate and correct, and the right result was reached.

[2] Complete Unanimity In Federal Circuits Deciding The Question. This issue lacks overall, national importance because there is no present confusion in this area of the law. Admittedly, the question is important to petitioner but only because he has been sentenced to die for his felonious transgression. No conflicts of law presently exist between the federal circuits who have addressed this issue; rather the Fifth, Ninth, and Eleventh Circuit Courts of Appeal are in complete unanimity. Although several states — Mississippi is certainly not one of them — have imposed a reasonable doubt standard in this situation, such is a product of construction of state statutes and not due process demands.

[3] Controlling Principles Settled in Proffitt. Nothing has been shown by this petitioner to warrant re-examination of certain principles that were settled, we opine, in Proffitt v. Florida, 428 U.S. 242 (1976). This Court in Proffitt had under scrutiny a bifurcated death penalty scheme virtually identical to the one adopted in 1977 by the State of Mississippi. It is perfectly clear that Florida did not require application of a reasonable doubt standard to the weighing of aggravating and mitigating circumstances peculiar to sentencing. This Court upheld the constitutional integrity of the Florida statutes. Specifically, the Court found that "[t]he directions given to judge and jury by the Florida statutes are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones." 428 U.S. at p. 258 [emphasis ours]

[4] Natural and Practical Effects of Contrary Results. Petitioner claims that at least seven (7) states ". . . presently require the reasonable doubt standard by statute, court rule, or pattern jury instruction. . ." (Gray's petition at p. 7) If this is true, then a vast majority of the states with death penalty statutes has not applied this standard to the balancing or weighing process required during sentence-determination. Consequently, a result other than the one reached below would have a devastating impact upon the constitutionality of numerous capital sentencing schemes. Both the very natural and practical effects of any new rule of constitutional law would be to create confusion and chaos in the capital sentencing arena and to generate a bloody plethora of post-conviction law suits from death penalty defendants who did not, at their state court trials,receive the benefit of the reasonable doubt standard.

[5] The Result Below Was a Product of Fundamental Fairness. The result reached below was fundamentally fair and flowed in the wake of good faith efforts by Mississippi law enforcement authorities, local prosecutors, the trial court, and the Supreme Court of Mississippi to scrupulously protect the constitutional rights of the defendant. Gray, who had been released on parole from an

Arizona prison after serving only seven (7) years for murder number one, came to Mississippi and within a year of his parole committed murder number two. Gray was twice tried in the Circuit Court of Jackson County, Mississippi, for the murder of the Scale's child. His first conviction and sentence of death was reversed by the Supreme Court of Mississippi on November 16, 1977. [Gray v. State, 351 So.2d 1342 (Miss. 1979)]. His second conviction and sentence of death was affirmed by our Court on September 26, 1979. [Gray v. State, 375 So.2d 994 (Miss. 1978)]. Thus, Gray's guilt and the penalty of death has been fixed below by two dozen Mississippi jurors.

In addition, petitioner's second conviction and sentence of death received plenary review by the Supreme Court of Mississippi on direct appeal. After this Court denied certiorari, petitioner's case was reviewed de novo in a state court post-conviction context. In the wake of a federal habeas petition, an evidentiary hearing was conducted in federal district court. The district court's denial of habeas relief received full consideration by a three judge panel of the Court of Appeals. Both panel rehearing and rehearing en banc were denied. The appellate process has been slow and tedious, but it has been full and fundamentally fair.

Further discussion of these particular points is briefly, but more fully, developed as follows. Section 99-19-101, Mississippi Code 1972 Annotated (1977),[1/] provides, inter alia, that:

* * * * *

> (3) For the jury to impose a sentence of death, it must unanimously find in writing the following:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and
>
> (b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

* * * * *

1/ Petitioner's Appendix D at p. 2.

Thus it is clear the Mississippi statute, much like the Florida law under scrutiny in Proffitt, requires the sentencer imposing a sentence of death to state in writing its unanimous finding "[t]hat sufficient aggravating circumstances exist . . . and [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." Another portion of our statutory scheme —— Section 99-19-103, Mississippi Code 1972 Annotated[2/] —— provides, inter alia, that:

> *****The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed.*****

Under Mississippi law the existence of aggravating circumstance(s) are facts susceptible to proof under a reasonable doubt standard. Stated differently, ". . . the state has the burden to prove, not only the guilt of the defendant, but also to prove aggravating circumstances. . ." Gray v. State, 351 So.2d 1342, 1346 (Miss. 1977). Another procedural safeguard inherent in our statutory scheme is the requirement that the jury unanimously find the existence of one or more aggravating factors before said factor(s) may be relied upon to support a sentence of death. In this posture, a finding by all twelve (12) jurors of the existence, beyond a reasonable doubt, of one or more aggravating factors is the sine qua non of infliction of the death penalty.[3/] Then, and only then, can the jury proceed to the next step involving consideration and weighing of aggravating and mitigating factors. Then and only

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2/ Petitioner's Appendix D at p. 4.

3/ To this limited extent the reasonable doubt standard is applied by the Mississippi sentencer in determining whether a death sentence is the appropriate punishment in a particular case. Such belies petitioner's suggestion that the reasonable doubt standard is totally extraneous to sentence-determination. Nevertheless, proof of existing facts and the weight to be given those facts are horses of entirely different colors. Neither the Eighth nor the Fourteenth Amendment require a reasonable doubt standard, if any standard at all, in assessing the question of weight.

then is the sentencer required to determine whether there are insufficient mitigating circumstances to "outweigh" [§ 99-19-101 (3)(b)] or "overcome" [§ 99-19-103] the aggravating circumstances found unanimously beyond a reasonable doubt.[4/]

This procedure, in our view, fully comports with due process because the requirement that aggravating factors outweigh the mitigating factors before the death penalty can be imposed is not an element of the crime of capital murder in Mississippi. (See Petitioner's Appendix D at pp. 1.) Our state, like Florida, utilizes a bifurcated procedure where the sentence-determining proceeding is a completely separate proceeding conducted only after guilt beyond a reasonable doubt has been established. A mere resemblance between the guilt-finding and sentence-determining phases is not controlling on the question of whether a reasonable doubt standard, or any other standard, should be applied to the ultimate sentencing decision in a capital case. The critical distinction between the two stages is that the first phase of trial focuses solely upon the question of guilt where the State must prove each essential element of the crime charged beyond a reasonable doubt. The second stage, on the other hand, is concerned only with the sentence to be imposed once guilt has been fixed. Gray v. State, 351 So.2d 1342 (Miss. 1977), note 1 at p. 1347.

4/ Under Mississippi law the defendant has no burden of proof with respect to mitigating circumstances. The Supreme Court of Mississippi has said that ". . . one on trial for capital murder must be allowed, at his option, to present mitigating circumstances. Jordan v. State, 365 So.2d 1198, 1206 (Miss. 1978). There is no requirement that the defendant prove the existence of mitigating factors beyond a reasonable doubt or even by a preponderance of the evidence. Rather, the defendant's task is to simply proffer evidence of mitigating circumstances for the sentencer's consideration. The ensuing process of weighing the various aggravating factors against the mitigating ones submitted for consideration ". . . may be hard [but] they require no more line drawing than is commonly required of a factfinder in a lawsuit." Proffitt v. Florida, 428 U.S. at p. 257. Although a reasonable doubt standard is not applied to the weighing process, the sentencer's finding "[t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating [ones]" must be unanimous.

In re Winship, 397 U.S. 358 (1970), relied upon by petitioner, explicitly held ". . . that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at p. 634. We contend that the Due Process rationale of Winship does not apply in Mississippi to the sentencing phase because guilt has already been fixed and the aggravating and mitigating circumstanes are not elements of the crime. Rather, their function is to simply channel the sentencer's discretion in a structured way as required by Furman v. Georgia [citation omitted].

When this Court, six (6) years post-Winship, decided Proffitt, it was well aware that the Florida bifurcated scheme did not require the sentencer to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. Proffitt complained that because Florida law assigned no specific weight to any of the circumstances proffered for the sentencer's consideration, ". . . it [was] not possible to make a rational determination whether there are 'sufficient' aggravating circumstances that are not outweighed by the mitigating circumstances . . ." 428 U.S. at p. 257. In addressing Proffitt's contention with specific rhetoric, this Court opined:

> While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing

> discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.
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> 428 U.S. at pp. 257-58 [emphasis ours].

The capital sentencing procedure under rigorous scrutiny in Proffitt was declared to be facially constitutional. This, we respectfully submit, is significant. While Gray might suggest that Proffitt was decided solely within the context of constitutional imperatives flowing from Furman v. Georgia [citation omitted], we opine that this Court is bound to have kept in mind the Due Process concerns of Winship. We strongly disagree with petitioner that ". . . the prior decisions of this Court point ineluctably to the constitutional imperative of a reasonable doubt standard. . ." (Gray's petition at p. 7) If this is true, why did this Court conclude in Proffitt that "[t]he directions given [to the sentencer] by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones?" Proffitt succinctly declared as constitutional on its face a capital sentencing procedure virtually identical to the one adopted by Mississippi, including its weighing of aggravating and mitigating circumstances.

Petitioner declines to confront the distinction between the proof of facts at sentencing and the weighing of facts at sentencing. While the existence of an aggravating circumstance is a fact susceptible in Mississippi law to a reasonable doubt standard, the weighing of established facts (i.e., aggravating factors) against proffered facts (i.e., mitigating factors) is not a process susceptible to proof by either party. Stated differently, the weighing process does not involve any truth-finding. Any suggestion to the contrary is simply based on a misunderstanding of that process.

The Fifth Circuit Court of Appeals decided this question correctly after giving it full consideration. Its views are wholly consistent with those expressed by the Eleventh Circuit in Ford v. Strickland, 676 F.2d 434, 441-42 (5 Cir. 1982) reh'g en banc,

696 F.2d 804, 817-19 (5 Cir. 1983). Moreover, the Ninth Circuit, in Harris v. Pulley, 692 F.2d 1189 (9 Cir. 1982), recently addressed the contention that the State of California must prove beyond a reasonable doubt that the death penalty is appropriate. In dismissing this claim, the Court of Appeals echoed our present sentiments. We quote:

> The United States Supreme Court has never stated that a beyond-a-reasonable-doubt standard is required when determining whether a death penalty should be imposed. In Proffitt v. Florida, the Court upheld a statute that did not require this standard when the jury rendered an advisory verdict on whether the death penalty should be imposed. See Proffitt v. Florida, 428 U.S. at 257-58, 96 S.Ct. at 2969 (plurality opinion). Although the jury's verdict in this statute is mandatory, we do not think that this difference makes this statute distinguishable from the one in Proffitt. Moreover, we are not aware of any instance where the state must carry such a burden of proof when attempting to convince a sentencing authority of the appropriate criminal sentence. If the Supreme Court had intended for the burden in death-penalty cases to vary from the standard burden in all other criminal sentencing, it would have said so in one of the many modern cases dealing with the death penalty.
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> 692 F.2d at p. 1195 [emphasis ours].[5/]

Petitioner seeks added mileage out of this Court's recognition in prior decisions that the penalty of death is qualitatively different from any other penalty and requires "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (Gray's petition at p. 8.) Stretched to its breaking point, this language has become the battlecry for many death penalty defendants. They, like Gray, vigorously advocate that every conceivable procedural safeguard must be built into a capital sentencing scheme if it is to withstand constitutional scrutiny. We seriously doubt this Court intended for the individual states to grapple with such an onerous task. A defendant is not entitled to absolute perfection but to basic and fundamental fairness.

5/ This Court recently granted certiorari in Pulley v. Harris, Cause Number 82-1095, in the wake of a petition therefor filed by the State of California. We understand that review has been limited to a question involving proportionality review.

Petitioner suggests that because the states are not in complete harmony on the question, this Court should make explicit that which he finds implicit. Respondents see no compelling need for national uniformity in this area. It is clear from prior decisions of this Court that a state may ". . . regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of [the] people as to be ranked as fundamental." Synder v. Massachusetts, 291 U.S. 97, 105 (1934). Stated differently, a state's ". . . procedure does not run foul of the Fourteenth Amendment because another method may seem . . . fairer or wiser or . . . give a surer promise of protection to [a] prisoner . . ." Id, 291 U.S. at p. 105.

Summarizing these points, we submit that certiorari should be denied because: [1] the standard, if any, for weighing aggravating against mitigating circumstances is a matter peculiar to state law and not federal constitutional law; [2] the Court of Appeals for the Fifth Circuit gave this issue full consideration and decided it correctly; [3] not one whit of confusion presently exists as to the state of the law in this area; rather, the Fifth, Ninth, and Eleventh Circuits are in complete unanimity, and a great majority of the individual states do not require application of a reasonable doubt standard to the process of weighing aggravating against mitigating circumstances; [4] Proffitt v. Florida succinctly held that an identical statute was sufficiently clear and precise to enable the various aggravating factors to be weighed against the mitigating ones; [5] the natural and practical effect of any new rule at this belated hour would precipitate chaos and confusion and would undermine the constitutional integrity of a multitude of state capital sentencing procedures; and [6] the result reached by the state trial and appellate courts, as well as that judiciously reached in the federal arena, was fundamentally fair.

II.

CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO VIABLE REASON FOR THIS COURT TO DEPART FROM ITS PAST PRACTICE OF RELEGATING TO THE LOWER STATE AND FEDERAL COURTS THE TASK OF FORMULATING A TEST OF EFFECTIVE REPRESENTATION THAT IS CONSISTENT WITH THE DEMANDS OF THE SIXTH AMENDMENT.

The second question posed by petitioner tracks the same general theme as his first inquiry, viz., although the game itself is basically the same, all the ground rules are different.[6/] It would be imprudent for the Justices of this Court to exercise their discretion in favor of hearing and deciding this issue because, aside from hinting at a broad and general test in its prior decisions, the Court, historically and traditionally, has left the matter of formulating a test of effective representation by counsel to the lower courts. Petitioner's suggestion that because the penalty of death is different from all other punishments this difference requires a need for more effective lawyers in cases where the defendant is on trial for his life is not a compelling reason for departing from past practice and palpable precedent. Additional reasons for denying full consideration of this question are proffered as follows:

[1] Correct Adherence to Established Precedent. The Court of Appeals correctly adhered to its established precedent that ". . . while attorneys are not held to a higher standard in capital cases, the severity of the charge is part of the 'totality of circumstances in the entire record' that must be considered in the

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6/ There is no direct support for this theme in the Sixth Amendment arena. See Cuyler v. Sullivan, 446 U.S. 335 (1980)[The right to effective assistance of counsel guaranteed by the Sixth Amendment is the same whether counsel is appointed or retained]. Accordingly, it is clear that the standards do not vary according to whether trial counsel is appointed or retained. Why then should they vary according to the severity of the permissible punishment? See also Bass v. Estelle, 696 F.2d 1154 (5 Cir. 1983)[Standard of review for capital cases is the same as for noncapital cases].

effective assistance calculus." Gray v. Lucas, supra, 677 F.2d at p. 1092. Accord: Washington v. Strickland, 693 F.2d 1243 (5 Cir. Unit B, 1982), n. 12 at p. 1250 (en banc); Washington v. Watkins, 655 F.2d 1346, 1356-57 (5 Cir. 1981). The application to petitioner's case of the familiar Fifth Circuit criterion[7/] was fundamentally fair, and the right result was reached.

[2] Near Unanimity on Question of Constitutional Effectiveness. This issue is not one of extreme national importance because there is little, if any, incongruity in the federal arena with respect to Sixth Amendment effectiveness. All of the various circuits, save for the second circuit, now follow one variation or the other of the reasonably effective standard. To this extent there is unanimity on the question of constitutional effectiveness. The resolution of petitioner's Sixth Amendment claim by the Court of Appeals raises no issue of particular significance because it was only necessary to apply the familiar Fifth Circuit criterion to the facts in petitioner's case.

[3] No Conflict with Prior Decisions of this Court. The decision of the Court of Appeals does not in any way conflict with the prior death penalty decisions of this Court. Those cases were not decided in the context of the Sixth Amendment; rather they addressed Eighth and Fourteenth Amendment scenarios. The target of the predecessor decisions was either a state statute or a state trial judge, not the failings and shortcomings of state trial counsel.[8/] While Woodson, Lockett, and Eddings [citations omitted] held that the Eighth and Fourteenth Amendments require a defendant to have the opportunity to present any evidence in mitigation, there is no way to draw from those cases a corresponding Sixth

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7/ "[N]ot errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Gray v. Lucas, 677 F.2d 1086, 1092 (5 Cir. 1982), quoting from Herring v. Estelle, 491 F.2d 125, 127 (5 Cir. 1974).

8/ Stated differently, the decisions of this Court deal with "procedural flaw[s] in the system of justice," not with alleged flaws in the judgment of counsel. Washington v. Watkins, 655 F.2d 1346, 1356 (5 Cir. 1981).

Amendment duty that would require defense counsel to search out and present character evidence in every capital case. To the contrary, ". . . the posture of a given case may well justify, if not require, an effective attorney to refrain from presenting such evidence." Stanley v. Zant, 697 F.2d 955, 961 (11 Cir. 1983).

The four (4) "dubious principles" purportedly in conflict with the mere "tenor" of this Court's pronouncements (Gray's petition at pp. 15-16) are neither "dubious" nor "conflicting." First, the Court of Appeals did not retreat from its established rule that ". . . adequate investigation is a requisite of effective assistance." Gray v. Lucas, supra, 677 F.2d at p. 1093. It fully recognized that trial counsel's duty to investigate is not negated or eliminated by his client's refusal to disclose, even after appropriate inquiry, the names of potentially helpful or important witnesses in mitigation. Rather, the Court found — properly and logically so — that the scope of counsel's duty to investigate was simply "limited" by Gray's refusal. See Akridge v. Hopper, 545 F.2d 457, 458-59 (5 Cir. 1977) cert. denied, 431 U.S. 941 (1977).

Second, we find no suggestion in Lockett, Gregg, Proffitt, Eddings, or Jurek [citations omitted] that trial counsel's failure to conduct an independent investigation into the availability of potentially helpful witnesses constitutes ineffectiveness per se in a death penalty case. As noted by the Eleventh Circuit in Stanley v. Zant, supra, 697 F.2d at pp. 960-61, "[t]hese cases establish that, subject only to the loose evidentiary requirement of relevance, capital defendants have a right to offer any evidence they choose on character or record or circumstances of the offense. * * * Acknowledgment of the importance of character testimony and the right to have it considered by the sentencing body when presented does not of itself speak to the duty of counsel."

Moreover, respondent simply disagrees with petitioner that the Court of Appeals assumed that in every death penalty case ". . . mitigation and character witnesses are not crucial to a reliable determination of who shall live or die. . ." (Gray's petition at p. 16) Whether or not witnesses in mitigation are indeed "crucial"

must necessarily hinge, under the totality approach to ineffectiveness claims, on the unique facts of each case. The Court of Appeals found that character witnesses were not crucial to the defense asserted in Gray's case. This is a far cry from a definitive finding they are never crucial in any case.

Third, we disagree with petitioner that the analysis of the Court of Appeals ". . . indicates that an informed tactical decision as to strategy can precede, and even negate, counsel's responsibility to conduct an independent and adequate investigation." (Gray's petition at p. 16) In Stanley v. Zant, supra, 697 F.2d at p. 965, the Eleventh Circuit found that Williams v. Maggio, 679 F.2d 381 (5 Cir. 1982) (en banc), and Gray v. Lucas, 677 F.2d 1086 (5 Cir. 1982), support the idea that "[h]aving conducted a sufficient investigation, counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation." The Court in Stanley made the following observations:

> The attorneys in both Williams and Gray had conducted constitutionally sufficient investigations into the possibility of mitigation. The courts in both cases were thus understandably reluctant to second-guess the attorney's tactical decisions. This is no more than a specific application of the general principle that when an attorney makes an informed choice between alternatives, his tactical judgment will almost never be overturned on habeas corpus.
>
> 697 F.2d at p. 966.

See also: Washington v. Strickland, supra, 693 F.2d at p. 1255 (5 Cir. Unit B 1982) (en banc).

Finally, the Court of Appeals tailored its test for prejudice to Sixth Amendment breaches where ". . . a defendant alleges that his counsel's failure to investigate prevented his counsel from making an informed tactical choice. . ." Gray v. Lucas, supra, 677 F.2d at p. 1093. This test is not inconsistent with United States v. Morrison, 449 U.S. 361 (1981), which did not, by any stretch of one's vivid imagination, undertake to articulate, or even suggest, a viable test for demonstrable prejudice. Morrison simply teaches that a rule of per se prejudice is not the proper

medication for benign and superficial maladies and that the remedy for a violation of a defendant's right to adequate assistance of counsel should be tailored to the harm caused by that violation.

Nor does this test for prejudice appear to conflict with the en banc decision penned by the Court of Appeals in Washington v. Strickland, supra, 693 F.2d 1243 (5 Cir. Unit B, 1982).[9/] In Gray's case the Court of Appeals opined that "[t]he determination of whether a defendant has been prejudiced varies of course with each breach alleged." The test articulated in Gray addresses a narrow and particular breach, viz. when ". . . a defendant alleges that his counsel's failure to investigate prevented his counsel from making an informed tactical choice. . ." 677 F.2d at p. 1093. The test in Strickland, on the other hand, appears to address, not a particular breach, but overall performance in the entire effective assistance calculus.

Nevertheless, we reach for an alternative arrow contained in our constitutional quiver. The Court of Appeals found in Gray that "[t]o establish a constitutional violation, a defendant must show both a failure to investigate adequately and prejudice arising from that failure." 677 F.2d at p. 1093. The absence of prejudice was not the sole and primary basis for the result reached by the Court of Appeals which also found that". . . the investigation undertaken [by Wright and Heidelberg] was [constitutionally] adequate." 677 F.2d at p. 1093. Accordingly, this state of affairs detracts from the validity of petitioner's plea espousing a compelling need to resolve a conflict, if any. Obviously, there was an independent basis for the result reached by the Court of Appeals. Stated differently, trial counsel were found to be constitutionally

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9/ The State of Florida fully intends to petition this Court for a writ of certiorari in the Strickland case to consider, inter alia, the question "[w]hether the Court of Appeals in expressly overruling the Supreme Court of Florida and expressly rejecting the en banc opinion of another Court of Appeals, has applied the correct standard for review of claims of ineffective assistance of counsel."

effective. It was not necessary, therefore, to determine the prejudicial effect that may have resulted from their alleged errors.

[4] Ripeness of Plenary Review. Ripeness is a legitimate factor submitted for consideration on the question of plenary review. As stated previously, this Court has heretofore declined the invitation to formulate a precise standard of effectiveness in cases less than capital and has relegated to the lower courts the task of defining more specifically the standard of adequate representation by counsel.

It would be imprudent for the Court at this time to formulate or suggest a uniform Sixth Amendment standard unique to captial cases because it has yet to formulate a uniform standard for cases less than capital. We see no necessity for the Justices to provide a workable set of uniform and heightened standards governing trial counsel's investigation and preparation in death penalty cases when they have declined in the past to formulate the normal Sixth Amendment standard. Indeed, it would be impractical, if not impossible, to formulate a workable heightened standard when there has been no prior formulation of the workable norm. This Court should decline petitioner's invitation to put the proverbial cart ahead of the proverbial ox.

[5] Natural and Practical Effects of Contrary Results. The natural and practical effects of a result other than the one reached by the Court of Appeals would absolutely be devastating. A rule that a higher standard of effectiveness is required in capital cases would be tantamount to a rule that the legal standards for constitutionally adequate assistance of counsel vary according to the severity of the permissible punishment. A defendant charged with a misdemeanor would have to be satisfied with a less effective lawyer than one accused of a felony. The defendant charged with murder would be entitled to a more effective lawyer than a defendant charged with manslaughter. Where would one draw the line on this sliding scale of effectiveness?

The Fifth Circuit envisioned these anomalies in Washington v. Watkins, 655 F.2d 1346, 1357 (5 Cir. 1981). We quote:

> [W]ashington has not cited, and our own research has not revealed, any case in which the legal standards for constitutionally adequate assistance of counsel have been held to vary according to the severity of the punishment imposed upon the defendant. We refuse to so hold today.[18]

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18. Innumerable practical problems would be presented by such a holding. For example, since effective assistance is not judged by hindsight, the heightened standard would have to apply to all cases in which a capital offense was charged, regardless of whether the jury subsequently convicted the defendant of a noncapital offense or refused to impose the death penalty in a capital case. Recognition of a "sliding scale" for this constitutional standard would also suggest, for example, that a defendant charged with aggravated assault would be entitled to a more effective lawyer than one charged with simple assault or public intoxication. We decline to embark on such a treacherous path.

655 F.2d at p. 1357.

Another reasonably foreseeable effect of any contrary result reached by the Court at this belated hour would be the generation of countless post-conviction lawsuits by death penalty defendants whose cases on review did not receive the benefit of a heightened Sixth Amendment standard of effectiveness. It is likely that each case with its own unique set of evidentiary facts would have to be re-examined in the light of the heightened standard. Moreover, a heightened standard would encourage a vast majority of future capital defendants to vigorously assail the effectiveness of their trial lawyers. A rule of law that encourages protracted litigation is an impediment rather than an aid to the orderly administration of criminal justice.

[6] Invitation to Factual Quagmire. Ineffective assistance cases in general, and cases turning on the need for character witnesses in particular, are extremely fact specific. Since every case involving a constitutional claim of ineffective assistance of counsel turns on the totality of the facts in the entire record and

the conduct of the attorneys involved, this Court might well find itself entertaining a factual quagmire rather than addressing a straight issue of law.

[7] Petitioner Suggests No Workable Standard. Although petitioner laments that a higher standard under the Sixth Amendment is required in capital cases, he has never suggested what that standard should be. In our opinion, this state of affairs detracts from the validity of his suggestion that a heightened standard is a constitutional necessity.

[8] Severity of Sentence a Part of Totality. Under the Fifth Circuit criterion, the severity of the sentence imposed is not altogether ignored in assessing the effectiveness of state trial counsel. Rather, the seriousness of the charge and the severity of the sentence flowing in its wake " . . . is part of the 'totality of circumstances in the entire record' that must be considered in the effective assistance calculus." Gray v. Lucas, supra, 677 F.2d at p. 1092.

In Washington v. Watkins, supra, the Court of Appeals penned this language that we contend is entirely consistent with the demands of the Sixth Amendment:

> This is not to say, however, that the severity of the sentence faced by a criminal defendant is not a fact to be considered in the overall determination of whether counsel has been constitutionally adequate in a given case. While neither in capital nor noncapital cases is a defendant entitled to perfect or error-free representation, the number, nature, and seriousness of the charges against the defendant are all part of the "totality of circumstances in the entire record" that must be considered in the effective assistance calculus, just as are the strength of the prosecution's case and the strength and complexity of the defendant's possible defenses. Nonetheless, while the facts that must be considered will differ in each and every case, the legal standards for constitutionally effective assistance of counsel are constant.
>
> 655 F.2d at p. 1357.

While the severity of the permissible punishment does not affect the legal standards for constitutional effectiveness, it is a part of the "totality" approach utilized by the Fifth Circuit in analyzing Sixth Amendment claims. Accord: Washington v. Strickland, supra, 693 Fed.2d at p. 1250, n. 12 (en banc).

III.

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONER FAILED TO PROPERLY RAISE AND PRESERVE ANY CLAIM CONCERNING THE PROSECUTION'S INTERJECTION AT SENTENCING OF THE NON-STATUTORY AGGRAVATING CIRCUMSTANCE OF PETITIONER'S FUTURE DANGEROUSNESS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The third question posed by petitioner is not cert-worthy because it was not raised in the State Courts, the District Court, or in the Court of Appeals. The record reveals that petitioner did raise a substantive Estelle v. Smith[10/] claim. However, the point was not pursued at the evidentiary hearing in the District Court or addressed in post-hearing memoranda. Consequently, the Court of Appeals deemed such as waived [677 F.2d 1086, 1101-2]

During the sentencing phase of petitioner's trial, the State called Charlton S. Stanley, Ph.D. to testify concerning his examination and diagnosis of petitioner to rebut the conclusions reached in the MMPI introduced by the defense. Dr. Stanley had examined peitioner at the Mississippi State Hospital at Whitfield as a result of two separate commitment orders entered during the course of the original proceedings.

In the course of his testimony on direct examination, Dr. Stanley testified that he diagnosed petitioner as having a passive/aggressive personality disorder meaning that "he has a personality which [is] basically a hostile one and aggressive personality." [State Trial Transcript 604] He further testified that in his opinion the petitioner was sane and without psychosis.

In this context the following colloquy occurred:

> Q. Now, in regard to this hostile personality, Doctor, if in the future, he gets mad at somebody, will he repeat the act of murder?
>
> A. The best statistics psychologically, where psychological research shows, is that the best prediction of future behavior is to look at past behavior. And, I would suggest that, you know, looking at past behavior worth, the personality profile that he shows, I would have to answer yes.--That the chances are better than average, very good, as a matter of fact.
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> [State Trial Transcript 606]

10/ Estelle v. Smith, 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981).

No objection was interposed to the question or answer, and no objection was interposed to the District Attorney's comments regarding the same in closing argument. (See excerpt noted on p. 33 of Petition for Writ of Certiorari.) Neither of these incidents were assigned as error on direct appeal.[11/]

Petitioner first challenged this testimony in a post-conviction petition for a writ of error coram nobis. However, the claim was couched not in terms of Barclay v. Florida, supra, but in terms of Estelle v. Smith, supra. The Mississippi Supreme Court denied the petition without opinion, and virtually an identical petition, only this time for a writ of habeas corpus, was filed in the District Court.

Collaterally, petitioner raised in both his State and Federal petitions questions of effective assistance of counsel alleging among other grounds inadequate pre-trial investigation and the stipulation to the introduction of Dr. Stanley's testimony.

An evidentiary hearing was conducted by the District Court and petitioner introduced evidence in support of two claims; i.e., ineffective assistance of counsel and Witherspoon v. Illinois.[12/]

Post-hearing memoranda were requested, and petitioner in addition to briefing the two areas covered during the hearing addressed six other claims. These were:

1. That the capital statutory scheme in Mississippi on its face violates the Eighth and Fourteenth Amendments;

2. That petitioner's rights under the Fifth, Sixth and Fourteenth Amendments were violated by the introduction of several statements given by the petitioner to the police officers that were not freely and voluntarily given;

3. That the method of jury selection used in Mississippi violated petitioner's Sixth and Fourteenth Amendment rights;

4. That petitioner was denied his rights under the Fourteenth Amendment when the jury was not permitted to consider guilt of lesser included offenses;

11/ Unlike Barclay there was not a non-statutory aggravating circumstance found by the jury.

12/ Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968).

5. That the method of review adopted by the Mississippi Supreme Court deprived petitioner of his rights under the Eighth and Fourteenth Amendments, and

6. That the Mississippi Supreme Court has adopted an impermissably restrictive method of comparative review of death sentences.

In his appeal from the denial of the writ, the petitioner assigned as error the failure of the District Court to address all of the claims, including his Estelle v. Smith claim, raised in the petition. In affirming the decision of the lower court the Court of Appeals held:

> With respect to the third category of claims, those which were raised in Gray's habeas petition but neither pursued nor pressed before the district court, we find that the district court did not need to address those claims. See Harper v. Merckle, 638 F.2d 848, 855 (5th Cir. 1981); Corenswet, Inc. v. Amana Refrigeration, 594 F.2d 129, 139 (5th Cir. 1979); accord Bast v. Department of Justice, 665 F.2d 1251 (D.C. Cir. 1981); Stanspec Corp. v. Jelco, Inc., 464 F.2d 1184, 1187 (10th Cir. 1972); King v. Stevenson, 445 F.2d 565, 570-71 (7th Cir. 1971); Ark-Tenn Distributing Corp. v. Breidt, 209 F.2d 359, 361 (3d Cir. 1954).
>
> Sound reasons exist for the application of this rule. Our adversary system of justice depends in large part on "that concrete adverseness which sharpens the presentation of issues" and illuminates the disposition of difficult claims. Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). By raising a claim in the pleadings but failing to pursue it any further, a litigant fails to apprise the court fully of the legal and factual under pinnings of his claims. Instead of having issues clarified during the course of a trial by hearings, arguments or memoranda, the district court is left to divine the legal and factual bases of a claim on its own. This deprives the court of the benefits the adversary system was designed to confer. Moreover, when a party fails to press his claims, a district court is left in doubt as to whether any live controversy remains on that point. While a party must of course raise his claims in the pleadings, the pleadings only mark the beginning of a lawsuit. Having plead his claims correctly, a litigant may not abandon any further pursuit of his claims and then complain because the district court failed to address his contentions.
>
> The requirement that a litigant must pursue as well as raise his claims is particularly appropriate in light of our holding in Strickland. The burden which Strickland places on the district

> court to address each claim raised in a habeas petition puts a concomitant duty on counsel to give the court a full development of every claim he does not waive. We note also that raising multiple undeveloped claims gives rise to the possibility of using pleadings for delay. Without attributing any such motive to Gray's counsel, we note that such a tactic may be appealing in death penalty cases where delay may be a defendant's main hope.
>
> By requiring a party to pursue his claims actively, the issues are clarified and can be resolved by the district court with greater skill and speed. Adequate development of the issues also allows the district court to identify frivolous claims more easily and remove them from consideration. To the extent that attorneys are discouraged from filing frivolous claims, the habeas petitioner himself is aided since both the court and the petitioner's attorney are able to focus on those claims which merit the most attention. We thus find that those claims which Gray raised in his petition for habeas corpus but never pressed or presented again to the district court were abandoned.
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> 677 F.2d at 1102.

Only after all of the preceding had transpired did Gray in his petition for rehearing first raise the specter of a Barclay-type challenge to the testimony of Dr. Stanley. Specific note, however, should be made of the fact that the challenge was couched not in the substantive terms now alleged but in terms of a Sixth Amendment denial of effective assistance of counsel. [See Petition for Rehearing pp. 6-8.]

[1] The rule is now well settled that this Court will decline to entertain a claim in a petition for a writ of certiorari that was neither raised in the State courts, in the district court or in the court of appeals. Mabry v. Klimas, 448 U.S. 444, 65 L.Ed.2d 894, 100 S.Ct. 2755 (1980); Jenkins v. Anderson, 447 U.S. 231, 65 L.Ed.2d 86, 100 S.Ct. 2124 (1980). See also United States v. Santana, 427 U.S. 38, 49 L.Ed.2d 300, 96 S.Ct. 2406 (1976); United States v. Ramsey, 431 U.S. 606, 52 L.Ed.2d 617, 97 S.Ct. 1972 (1977); Dorsynski v. United States, 418 U.S. 424, 41 L.Ed.2d 855, 94 S.Ct. 3042 (1974); Anderson v. United States, 417 U.S. 211, 41 L.Ed.2d 20, 94 S.Ct. 2253 (1974). Accord Delta Air lines, Inc.

v. August, 450 U.S. 346, 67 L.Ed.2d 281, 101 S.Ct. 1146 (1981); Dothard v. Rawlinson, 433 U.S. 321, 53 L.Ed.2d 786, 97 S.Ct. 2720 (1977); Adicks v. Kirss & Co., 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970).

This case is a classic example of the metamorphic changes encountered by the States as prisoners advance from one level to the next in the State/Federal criminal justice system. As indicated supra, the status of Dr. Stanley's testimony has progressed from the point of no objection to waiver to reversible error. Certainly, under no stretch of the imagination could one, other than tongue-in-cheek, contend that the question has been exhausted in the State courts or addressed by the lower Federal courts.

[2] Alternatively, this Court, as well as all other Federal Courts, is barred from considering petitioner's Barclay claims based upon independent State procedural grounds.

In Picard v. Connor, 404 U.S. 270, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971) this Court stated:

> We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," Ex parte Royall, supra, at 251, 29 L.Ed. at 871, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. See Darr v. Burford, supra, at 203, 94 L.Ed. at 766; Davis v. Burke, 179 U.S. 399, 401-403, 45 L.Ed. 249, 250, 251, 21 S.Ct. 210 (1900).
>
> Respondent challenged the validity of his indictment at every stage of the proceedings in the Massachusetts courts. As the Court of Appeals pointed out, 434 F.2d, at 674, this is not a case in which factual allegations were made to the federal courts that were not before the state courts, see, e.g., United States ex rel. Boodie v. Herold, 349 F.2d 372 (CA2 1965); Schiers v. California, 333 F.2d 173 (CA9 1964), nor a case in which an intervening change in federal law cast the legal issue in a fundamentally different light, see, e.g., Blair v. California, 340 F.2d 741 (CA9 1965); Pennsylvania ex rel.

Raymond v. Rundle, 339 F.2d 598 (CA3 1964). We therefore put aside consideration of those types of cases. The question here is simply whether, on the record and argument before it, the Massachusetts Supreme Judicial Court had a fair opportunity to consider the equal protection claim and to correct that asserted constitutional defect in respondent's conviction. We think not.

Until he reached this Court, respondent never contended that the method by which he was brought to trial denied him equal protection of the laws. Rather, from the outset respondent consistently argued that he had been improperly indicted under Massachusetts law and, to the extent he raised a federal constitutional claim at all, that the indictment procedure employed in his case could not be approved without reference to whether the Fifth Amendment's requirement of a grand jury indictment applied to the States. He adverted to the Fourteenth Amendment solely as it bore upon that submission. The equal protection issue entered this case only because the Court of Appeals injected it.

Id., at 275-277, 30 L.Ed.2d at 443-44.

See Also Anderson v. Harless, ___U.S.___, 74 L.Ed.2d 3, 103 S.Ct. 276 (1982).

Petitioner, however, has no State remedies to exhaust. In Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558, 1570 n. 28, 71 L.Ed.2d 783 (1983), this Court held:

As we recognized in Sykes, 433 U.S., at 78-79, 97 S.Ct., at 2502, the problem of waiver is separate from the question whether a state prisoner has exhausted state remedies. Section 2254(b) requires habeas applicants to exhaust those remedies "available in the courts of the State." This requirement, however, refers only to remedies still available at the time of the federal petition. See Humphrey v. Cady, 405 U.S. 504, 516, 92 S.Ct. 1048, 1055, 31 L.Ed.2d 394 (1972); Fay v. Nola, 372 U.S. 391, 435, 83 S.Ct. 822, 847, 9 L.Ed.2d 837 (163). Respondents, of course, long ago completed their direct appeals. Ohio, moreover, provides only limited collateral review of convictions; prisoners may not raise claims that could have been litigated before judgment or on direct appeal. See Ohio Rev.Code Ann. § 2953.21(A) (1975); Collins v. Perini, 594 F.2d 592 (CA6 1979); Keener v. Ridenour, 594 F.2d 581 (CA6 1979). Since respondents could have challenged the constitutionality of Ohio's traditional self-defense instruction at trial or on direct appeal, we agree with the lower courts that state collateral relief is unavailable to respondents and, therefore, that they have exhausted their state remedies with respect to this claim.

In Mississippi post-conviction relief on non-jurisdictional matters can only be obtained by way of a writ of error coram nobis. See Miss. Code Anno. § 99-35-145 (1972).

In the recent case of Callahan v. State, Miss. Sup. Ct. Misc. Docket No. 1445 (Opinion not yet published, Feb. 16, 1983), the Mississippi Supreme Court commented upon successive claims grounded upon factual questions which have already been determined.

> We first address the petition for writ of error coram nobis by recognizing a basic premise in this jurisdiction that such post-conviction petitions are limited in nature. Justice Ethridge, in the case of In re Broom's Petition, 251 Miss. 25, 168 So.2d 44 (1964), set forth the circumstances in which a writ for error coram nobis would lie. His opinion states:
>
> > The general scope of a petition for writ of error coram nobis, or motion in the nature thereof, is to bring before a court a judgment previously rendered by it, for the purpose of review or modification. There must be some error of fact and not of law affecting substantially the validity and regularity of the proceedings, which was not brought into issue at the trial. Such motion or petition is an extraordinary and residual remedy to correct or vacate a judgment on facts or grounds not appearing on the face of the record, not available by appeal or otherwise, and not discovered until after rendition of the judgment, without fault of the party seeking releif. It is an attack on a judgment of conviction, valid on its face, that defective by reason of facts outside the record, which deprived accused without fault on his part of the constitutional right to a fair trial. [Emphasis added]. [251 Miss. at 32-33, 168 So. 2d at 48].
>
> With this background in mind, our Court has since ruled that the writ of error coram nobis will not be allowed to relitigate questions of law or fact already decided by this Court. Auman v. State, 285 So.2d 146 (Miss. 1973). Moreover, "a defendant in a criminal trial may not deliberately hold back matters known to him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again." Holloway v. State, 261 So.2d 799, 800 (Miss. 1972).

See also Edwards v. State, Miss. Sup. Ct. Docket No. 53,298 (Opinion not yet reported, March 23, 1983)(Court held that question of law concerning inflammatory comments of District Attorney were barred from review in post-conviction petition where question based on same had been raised on direct appeal in the context of effective assistance of counsel.)

Consequently, since petitioner couched his claims concerning Dr. Stanley's testimony in terms of Estelle v. Smith, supra, he is now estopped under State law from recasting the same arguement in terms of Barclay.

In summary, we submit that certiorari should be denied for two reasons. [1] This Court has made it abundantly clear that it will not entertain claims which have not been exhausted in the State courts or addressed by the lower Federal courts. [2] Since petitioner initially raised his objection to Dr. Stanley's testimony in terms of Estelle v. Smith, supra, he is barred under State law from relitigating the same factual situtation in terms of Barclay v. Florida, supra.

VII. CONCLUSION

The petitioner's contentions pose no question of particular moment or indecision in the case law of the land and it is therefore respectfully submitted that the petition for writ of certiorari in all justice should be denied.

Respectfully submitted,

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